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AMERICAN JUDICATURE SOCIETY
Ann Arbor, Michigan

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JOURNAL OF THE AMERICAN JUDICATURE SOCIETY

Volume 27 OCTOBER, 1943 No. 3

Annual Report of the President

DAVID A. SIMMONS

TO THE MEMBERS OF THE SOCIETY:

For the third time I have the honor to report to you on the work and progress of our Society for another year.

IN MEMORIAM

It is with sorrow that I report the very heavy losses which our Society has suffered during the current year because of the deaths of so many of our friends. Three of our directors were among these. John H. Wigmore, acknowledged to be one of the great legal scholars of all time, was a helpful friend of this Society from its beginning. The other directors were Oliver O. Haga of Idaho and John W. Cronin of Massachusetts. Judge Frank E. Atwood, who as senior vice-president served out the uncompleted term of our president, Newton D. Baker, after President Baker's death in January, 1938, also passed away this year. Others who had served our Society as directors or contributors were former Chief Justice Royal A. Stone of Minnesota, former Governor Frank O. Lowden of Illinois, Frank M. Drake of Kentucky, Joseph F. O'Connell of Massachusetts, Silas A. Harris of Ohio, Peter J. Monaghan of Michigan, Harvey T. Harrison of Arkansas, Harry P. Lawther of Texas, former Justice Louis H. Fead of Michigan, Judge Joseph N. Ulman of Maryland, and others, public-spirited lawyers and judges all, who had contributed freely of their time and effort not only to the work of this Society, but to that greater field of activity, public improvement of the administration of justice. We will miss their friendly presence, and society as a whole will miss their generous efforts and assistance in all pro bono publico activities.

MEETINGS

Following the precedent of the last two years, an interim meeting was held in Chicago on March 29, 1943, at the time of the midwinter meeting of the American Bar Association. Informal talks on procedural reform in their respective states were made by Judge Frederic M. Miller of Iowa, Judge Laurance M. Hyde. of Missouri, and William O. Wilson of Wyoming. There was some discussion on the subject of widening the scope of activity of the Society on a hemisphere basis and occasionally printing in the JOURNAL articles on the judicial systems of Canada and the countries of Central and South America. Authority was granted the officers for the Society to accept membership in the Inter-American Bar Association, and since that meeting the President and Secretary have signed the charter of that association to evidence the membership of this Society therein.

There has been, and will be, no attempt to hold large meetings during the war period. We recognize the difficulties of transportation, and

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the Chairman of the Board in calling this and the preceding meeting has suggested the attendance only of those who expected to be in Chicago in connection with other necessary activities. After the war we hope to broaden the scope of the annual meeting in conformity with the increasing importance of the Society.

JOURNAL

The JOURNAL has a circulation of approximately ten thousand each issue, which includes the members, libraries, bar associations and their committees, and free copies distributed to those persons interested in the administration of justice who write in and ask that they be placed on the mailing list.

The contents of the JOURNAL continue on the same high plane which it has maintained since its inception. During the current year there have been articles by Judge John J. Parker, Henry P. Chandler, John S. Bradway, Jacob M. Lashly, George E. Brand, Judge Merrill E. Otis, Chief Justice Harlan F. Stone, Judge Charles E. Clark, Chief Justice James P. Alexander of Texas, Judge Robert N. Wilkin, Chief Justice Robert G. Simmons of Nebraska, and other outstanding and able contributors. Herbert Harley, our editor, continues to give direction to progressive thought in the field of judicial administration, and he has been ably assisted not only with the editorial work of the JOURNAL, but in the administration of the office of the Society, by Glenn R. Winters, assistant editor and assistant secretary-treasurer. Carl B. Rix, Jacob M. Lashly, Mr. Harley and others have supplied inspiring editorials which reflect the highest ideals and aspirations of our profession. All of our directors and officers are particularly invited to contribute editorials suitable for publication in the JOURNAL. Manuscripts on any subject within the scope of the Society's field are accepted whether they are from members or otherwise.

JUDICIAL ADMINISTRATION

Some progress has been made during the year in those fields in which the Society has worked to improve the administration of justice. In bar integration, Wisconsin joined the states, now a majority, having that form of professional organization. Progressive leaders of the bar of that state had actively campaigned for a number of years, and the story is told in an interesting way in the June issue of the JOURNAL. It shows what persistent effort can do. A similar bill, which passed the West Virginia Legislature by a three-to-one vote, was vetoed by the Governor at the close of the session. In Colorado a bill providing for bar integration was defeated.

The chief item of interest in the field of judicial selection was the action of the voters of Missouri in sustaining their new method of judicial selection by a majority vote. Certain other states have been actively considering similar plans of taking the judges out of politics, and details of the progress during the year will be found reported at some length in the June issue of the JOURNAL.

MEMBERSHIP

As most of the directors of the Society will freely attest, the membership work of our organization has continued, and with gratifying results. As some of you have doubtless already suspected, the continuous growth in numbers and in financial strength of our Society is a pet objective of your President. With the advent of war we were all dubious as to whether the healthy growth of the preceding year could be maintained, as we realized that all national professional organizations such as ours ordinarily mark time during the hostilities. Nevertheless, the need to assist in the improvement of the administration of justice was never greater, both in its narrow meaning as applied to court procedure, and in its wider application to the needs of human society.

We have not attempted any nationwide membership campaign, but have worked through the directors in certain of the States where membership work had not been done for a year or two. A few of the directors in these States, where such activity had not been attempted since the beginning of the war, felt at first that little could be done, but all were willing to try. Invitations which they issued to judges and lawyers in their states who are or should be interested in our field of activity were joined in by personal letters from the President, and the

results were truly remarkable. Several of the directors wrote and expressed their astonishment at the favorable responses they received from invitations to join. They found, as your officers had also learned, that there are many people who are deeply troubled when they view the social scene, including its judicial aspects. Such people do not consider an invitation to join a society such as ours an imposition, but a call to service. It was the President's high privilege to extend an invitation to join our Society to all the persons nominated by our directors, and in connection with that work we mailed 11,815 letters. By August 15, 2,337 invitees accepted membership in the Society, a return of 20%. Several hundred of them entered into correspondence with your President not only about the work of the Society, but expressing their thoughts and aspirations for a better world. I am grateful to have been the recipient of such expressions and of such positive proof of the high ideals of so many of our fellows. The following letter is typical of many others:

"I appreciate more than I can tell you the honor of your invitation and I am signifying my acceptance. I am thoroughly in accord with the expressions you make in your letter as to the aims of the Society. The Bar must lead the way and adequately concern itself with not only the practice of the law, but both the making of the law and the administration of the law, and be actuated in these purposes wholly and primarily by a desire to see that justice prevails. Otherwise, there is no reason for the continued existence of the Bar, and any disregard of these purposes on the part of the Bar simply furnishes destructive ammunition. I need not tell you how zealously I shall embrace any opportunity to devote time and attention to these aims."

Among the new members are governors, United States senators, many congressmen, judges and justices ranging from those on the local trial bench to members of the great court that adorns our national capital; and interspersed among all of these—the lawyers, some from the great cities, some from the county seats, and some from the little towns that dot the countryside. We welcome them all to our membership and are grateful for the aid they give our cause.

Perhaps you will be interested in the details of the growth of the Society the last few years.

Date	Members	Gain In Numbers	Gain In Pct.
Dec. 1, 1939....	1,698		
Dec. 1, 1940....	2,247	549	32.2%
Dec. 1, 1941....	2,476	229	10.1%
Dec. 1, 1942....	3,692	1,216	49.1%
Aug. 6, 1943...	5,673	1,981	53.6%
Increase from 12/1/39 to 8/6/43..		3,975	234.0%

Now that the Society has become completely self-sustaining, it is not imperative to continue the rapid rate of growth which has characterized it for the past three years. However, all national professional organizations lose from eight to ten per cent of their membership each year by death, resignation, or dues delinquency, and therefore it is necessary that steady effort be exerted to recoup these losses and to continue a reasonable growth for the Society. During the past year we lost 44 members by death, 126 by resignation, and 103 were dropped because of failure to pay their dues, a total of 273.

LOOKING AHEAD

The fiscal year of the Society ends on November 30th. This year, as heretofore, the finances of the Society were duly audited at the close of the fiscal year by certified public accountants and found to be correct in all particulars. In the early years the activities of the Society were financed in part by the dues of its members, but in large measure by donations from public-spirited individuals and from institutions. For instance, for several years we received grants from the Carnegie Foundation, which suggested that the Society should become self-sustaining. The increase in membership two years ago made this possible, and our Society now is supported entirely by the dues of its members. It is supported so well that several thousand dollars have been added to the surplus during the current year. This is due, in the first instance, to your generosity in maintaining your memberships, but equally to the prudent management of the office of the Society under the direction of Mr. Harley and Mr. Winters.

Our Society, firmly established in the respect of the profession and the public, with a strong and growing membership, looks forward to a continuation of its efforts in the important

field of improving the administration of justice. Its purpose has never been better expressed than by former Chief Justice Hughes when he said: "The Judicature Society endeavors to penetrate to the roots of the evils that afflict the administration of justice and to ascertain what means are best adapted to the improvement of the system of administration. There are common problems which must be solved, and every community may be helped by the experience of others." This work it will continue to do, with your help. And what work could we do more worthwhile and which gives more inherent satisfaction than to assist in administering justice, redressing wrongs, safeguarding rights, and thereby preserving civilization?

Respectfully submitted,
DAVID A. SIMMONS,
President.

August 25, 1943.

A Summary of the Courts in the City of Mexico*

JORGE LUNA Y PARRA†

OUR SYSTEM OF LEGISLATION and application of law is based strictly on written law. For the presentation or filing of a new suit before a court the precedents established by resolutions in similar cases are practically of no value. The Mexican attorney has to base his action only on what is prescribed in the articles of the law.

I am going to make a summary of the different courts in the City of Mexico, their characteristics, functions and the system and organization under which they work. This will necessarily be a short essay and will almost be limited to definitions of the various courts. I shall examine first the civil and mercantile courts; that is those which deal with controversies between individuals. For the sake of order, I shall examine them according to the importance of the business under their jurisdiction.

CIVIL COURTS

The *Courts of Peace (Juzgados de Paz)* are those with power to decide in controversies up to $200 (two hundred pesos).

One of these Courts of Peace is established in each Police Section of the city. The claim must be filed before the Judge with jurisdiction in the section where the defendant resides, but if it refers to rents or an action on real estate, or a lease contract, then the case must be submitted to the court where the property is situated.

The cases are decided in one hearing. The sentence passed by the Judge of Peace can be contested only by means of injunction *(amparo)* before the Supreme Court of Justice if a constitutional right has been violated.

The procedure before the Courts of Peace is the fastest and easiest in all the courts of the City of Mexico.

I shall now take up the courts next in importance because of the value of the controversies they can decide.

Minor Courts: (Juzgado Menor). A Minor Judge can decide on cases from $200.00 (Two hundred pesos) up to $1,000.00 (One thousand pesos).

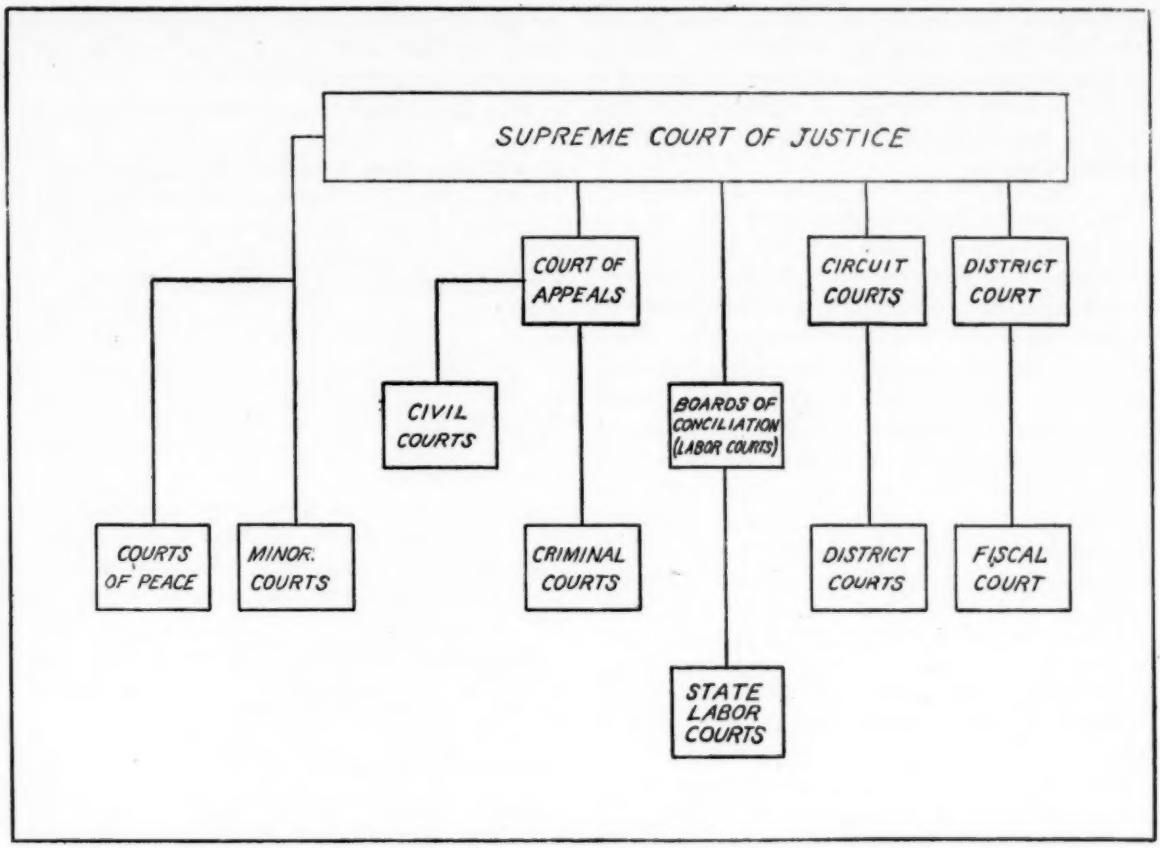
These Minor Courts take up a much greater variety of cases. The claimant can choose the court he wishes if the defendant resides within the federal district.

The procedure is longer and more complicated than that followed in the Courts of Peace, as there is no controversy which the Minor Courts can decide that can be finished in only one hearing. The sentences passed by these courts can also be contested only by means of injunctions *(amparo)* directly before the Supreme Court of Justice, when there is a constitutional right violated. The Supreme Court has the last word and passes the final resolution. The Judges are appointed by the Court of Appeals.

Civil Courts: The Civil Courts decide on matters greater than $1,000.00 (One thousand pesos). There are fourteen Civil Courts in the

*Address before the State Bar of Texas, Houston, July 2, 1943.

†Member of the bar of Mexico City, and treasurer of the Mexican Bar Association.



City of Mexico. The civil judges are appointed by the Court of Appeals. The claimant is free to choose any Civil Court in the federal district for a suit for more than $1,000.00 (One thousand pesos) if the defendant resides in the federal district.

These courts can decide most cases, but the principal ones are: Summary, which deal with fees, alimony, mortgages, etc., and are the fastest in procedure. The executory process comprises those cases which have as a base, the collection of a note which is not more than three years overdue; the confession of the defendant in court, the execution of a sentence, etc.

There is an ordinary procedure which is long and complicated. This procedure is followed for an action on the construction and execution of a contract, or a note overdue for more than three years.

The Civil Courts have also power to deal with inheritance procedure. They also deal with cases where there is no controversy, but which require according to law the mediation of the court. This procedure known as *jurisdiccion voluntaria.*

The sentences passed by the Civil Courts can be appealed before the Court of Appeals (Tribunal Superior), which is the court which will revoke or confirm the resolution of the lower court.

The *Criminal Courts* are those in charge of investigating the crimes and sanctioning them. Most of our criminal courts are established in the same building as the Penitentiary in order to make the examination of the delinquents easier. In our system of courts we do not have the jury. The sentence passed by the Criminal Court can be appealed before the Court of Appeals (Tribunal Superior), whose sentence can be contested in turn only before the Supreme Court.

The Court of Appeals: This court as we have stated in preceding paragraphs resolves in second instance the appeals filed against sentences rendered by civil and criminal courts. This court is composed of eight sections with three magistrates in each section. These mag-

istrates are appointed by the Supreme Court. The resolutions rendered by this court can be appealed before the Supreme Court in case of a violation of a constitutional right and it will then be our Supreme Court which will render the last judgment.

THE FEDERAL COURTS

District Courts: The controversies between a federal power and an individual person or concern are aired in the District Courts. There are six District Courts in the City of Mexico, and their judges are appointed by the Supreme Court. These are the courts of first instance in this kind of procedure and their function is to decide controversies that may arise under the federal laws. An example that we may cite in this kind of procedure would be the nullity declared on a patent registry title ordered by the federal patent department for one reason or another. The person affected in case he believes that the federal department has violated the law by declaring the nullity of the title, has the right to file his complaint before the district judge.

The judgment rendered by the District Judge may be contested or appealed before the Circuit Court which will render a sentence in second instance.

The District Courts also decide in the injunctions presented against the responsible authorities for violation of a constitutional right when there is no other legal procedure that may be used against these acts or resolutions. A review of the judgments rendered in these cases by the District Courts can be requested from the Supreme Court.

Circuit Courts: The Circuit Court being a court of appeals has the object of confirming, revoking or modifying the judgment rendered by the District Judge. The party who appeals must state the grievance caused by the sentence appealed from and should brief both facts and law. The new judgment rendered is also appealable, if a constitutional right has been violated, before our highest court, the Supreme Court of Justice. The magistrates of the Circuit Court are appointed by the President, from three names proposed by the Supreme Court. Only one Circuit Court exists in the City of Mexico.

The *Fiscal Courts* decide on controversies presented by persons against resolutions of the federal treasury or any fiscal department when they consider that a fiscal law has unduly or unjustly been applied to them.

The fiscal court is composed of fifteen magistrates. It is divided in five courts with three magistrates in each court. The magistrates are appointed by the President of the Republic on proposal of the Finance Department and approval of the Senate.

The judgments are appealable before the District Courts for a constitutional violation by an injunction suit.

Labor Courts: There are two Labor Courts: The Central Boards of Conciliation and Arbitration and the Federal Board of Conciliation and Arbitration.

It is the duty of these boards to take cognizance of and decide differences and conflicts between capital and labor which arise within their jurisdiction and which do not come under federal authority.

The Central Board is formed by one representative of the government, one of the employers, and one of the laborers.

The procedure is similar to that of the Civil Courts with slight differences such as that there is a previous hearing before entering into the trial and that has the object of endeavoring to obtain a settlement between the parties. The judgments rendered by these courts are appealable before the Supreme Court when a constitutional right has been violated.

The Federal Board of Conciliation and Arbitration is established in the City of Mexico to take cognizance of and resolve differences or conflicts between workers and employers arising out of the labor contract or acts intimately related thereto, in the case of concerns or industries operating under a Federal concession or whose activities are carried on totally or partially within the federal zone.

Just as the Central Boards, this court is formed by a representative of the government, one of the employers and one of the laborers.

The conflicts or differences between concerns and laborers sometimes start in some place out of the City of Mexico. In this case, the suit is presented in the Labor Court of the State and we may say that a preparatory trial or procedure is held, as this court does not render a judgment. The resolution this court gives is considered as an opinion which is taken greatly into consideration when the case is brought to

the cognizance of the federal board.

The sentence given by this board can be appealed before the Supreme Court.

THE SUPREME COURT OF JUSTICE

As can be noticed in the summary of the courts in the City of Mexico, they all have as a last chapter for definite and final resolution the judgment of the Supreme Court, which either confirms or revokes the sentences rendered by them.

The Supreme Court of Justice is composed of twenty-one judges, which are distributed in four courts of five judges each. There is one judge who is the president of the Supreme Court. The four courts are divided in the following manner:

The First Court has the cognizance of criminal cases.

The Second Court decides on administrative cases.

The Third Court takes the civil cases.

The Fourth Court handles the labor cases.

The ministers of the Supreme Court are appointed by the President of the Republic with the ratification of Congress.

The Supreme Court also has the cognizance of cases resolved in last instance in courts in the interior of the republic.

When a Court of the Supreme Court has rendered judgment in some legal topic, sustaining the same theory in five different cases it is considered jurisprudence. A lawyer can make use of this precedent of jurisprudence for a new case before the courts to give legal and doctrinal force to his case. This is the only case in Mexican law in which judgments rendered can be used as precedents. Our judges and legal system are always based on the ruling of our written law and codes.

I have given you a summary of our various courts. I am attaching to this small study a diagram of the courts in Mexico City and their procedure.

You may have noticed that our legal system differs from yours in various features. Nevertheless, they coincide and resemble each other in the most important point which is, that your courts and ours and the honorable lawyers of the United States and those of my country look forward to one same horizon: The true application of JUSTICE.

Why Not File Court Papers Flat and Unfolded?*

ALFRED C. CLAPP†

Improvements there have been in the filing systems of law offices from the time that papers were tied with a red ribbon and tossed or jammed in a tin, cardboard or wooden box—still said to be the custom in most of England and Scotland. Thereupon the boxes were stacked on racks, or, occasionally abroad, put in stubby, handsome mahogany chests having three large drawers. Even these devices were somewhat better than those a few years back of a New Jersey country lawyer of a not unsubstantial practice whose papers, after being tied with a legal ribbon, were, so the story goes, filed in a barrel, the barrel to be dumped as a file was needed. Filing of court papers too has come its way not only from the day when all the papers in a cause were put on a string (filum), but (speaking of a barrel) from the day when all original English writs passing under the great seal—which it will be remembered issued out of the court of chancery—were kept either in a little sack (whence the English "petty bag" office) or a hamper (whence the English "hanaper" office).

But with all the improvements in the filing of court papers, court clerks still put three creases in legal cap papers and file them folded up. One thereafter using them—and persons using them are the only ones for whom the papers were filed—must unfold each at no inconsiderable inconvenience to himself; and if he wishes to make notes, as he usually will, he must with his left hand hold the bundle which threatens at every instance to collapse into its original folds and with his chin hold his note paper as he writes. How much easier if papers were

*Reprinted from the New Jersey Law Journal, June 24, 1943.

†Editor, New Jersey Law Journal.

required to be both mailed flat when set for filing and filed flat. And then, as in good office practice, fastened chronologically on a cardboard back—say not more than an inch of papers to each back. A paper so fastened would not only be in its chronological place, but be less readily lost. The matter now put on the endorsement could be put on a first page, rendering the present blue, or other colored, back unnecessary for the court record. Some slight economy would be offered in the court filing cabinets; for folded papers bulk on an average perhaps one-fifth more than papers filed flat. Of course, a different type of filing cabinet would be demanded; hence a change over of the system would have to be planned to take effect after the war and at a time sufficiently in the future as not to scrap the present equipment.

The sixty-page search and the sixty-page account will still be unhandy—but when filed flat, it will not be nearly so much as one that has set rigidly in its creases for ten years. If deemed wise, could not such changes as these come about simply by rule of court? That conservatizing influence of the bench reaches down into the bar and hangs heavily over every clerk's office.

Pretrial and Divorce

SAMUEL FREIFIELD*

The purpose here is to inquire if pretrial can perform a useful function in divorce litigation. A categorical answer to that question should not be made without considering various factors incident to this area of litigation and indeed peculiar to it.

In attempting to apply the pretrial technic to the action for divorce, it must be borne in mind that many, and possibly a majority of these cases, are not contested[1]. From this fact alone, it would appear, at first blush, that a useless ceremony would be performed if a pretrial conference were required in an uncontested action. If the responsibility of the court is confined to an evaluation of the complaint and the supporting evidence, then it must be conceded that pretrial need have no place in such a proceeding. The most cursory analysis would seem to suggest, however, that the duty of the trial judge goes beyond that.

In the ordinary uncontested action, with possibly very few exceptions, it but remains for the plaintiff to reduce his claim to judgment. What may have started out as an adversary proceeding becomes, so to put it, consensual. Pretrial could serve no particular purpose in such case. The action for divorce, however, is an *adversary* proceeding, regardless of whether or not it is contested, and any implication that the action is, in effect, consensual must be avoided. Here consent can mean collusion or connivance, and if either of these elements becomes apparent, it automatically follows that the action must (or should) fail.[2]

Yet who will say that such factors are always absent in such cases, although not reflected by the record? If the trial judge takes a narrow, restricted view of his role, whether because of the pressure of other litigation more immediately recognized as adversary in nature, or because the trial docket is crowded with divorce cases, most of them uncontested, he may conclude that the responsibility is not his, and that his only concern should be that the evi-

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*Of the Steubenville, Ohio, bar. A previous article, "Broader Aspects of Pretrial," appeared in the June, 1942, JOURNAL (26:24).

1. For example, in 1939, there were nine hundred and ninety-seven civil cases of all kinds filed in the Court of Common Pleas of Jefferson County, Ohio. Over three hundred were divorce actions, and approximately two-thirds of the cases where divorce was decreed, were uncontested.

2. *Michie's Tenn. Code of* 1938 *Anno.* sec. 8437, provides in part: "If the defendant admit the facts charged in the bill or petition and relied upon as the ground for the divorce, or the bill be taken for confessed, the court shall, nevertheless, before decreeing a divorce, hear proof of the facts alleged. . . ."

See, also, *Ky. Rev. Stat.* (1942) sec. 403.030; *Publ. Laws Vt.* (1933) sec. 3119; *Gen. Laws R. I.* (1938) Ch. 416, sec. 18.

dence proffered in verifying the allegations of the complaint reaches the level of probative value.

Still it must be apparent that since a divorce action, even though not contested, *is* nevertheless an adversary proceeding, it becomes incumbent upon the trial judge to take a broader view of his duties and his obligations.

Society has a stake here.

The court, as well as every good citizen, will take cognizance of the necessity for preserving the family as a basic sociological unit. It is around the family that our civilization and many of its rules of conduct, written and unwritten, revolve. If this basic unit is worth fostering and buttressing, much more than lip service is required. The court should bear as part of its responsibility the will to accomplish such measures as may help preserve the family, within the framework of legislative mandates, to be sure. Admittedly, this must be done without prejudicing the rights of either party to a suit for divorce.

MARRIAGE IS MORE THAN A CONTRACT

The willing acceptance of that burden of obligation is vital since marriage goes beyond and transcends contract,—as has ofttimes been stated, it is a *status*. Society has a clearly defined interest in the marriage relationship. There may be religious concomitants. And it is not without its deep significance that historically the action for divorce was the exclusive province of the ecclesiatical courts.

So the severance or dissolution of this *status* must, of necessity, involve factors radically different from those obtaining in cases which treat of the dissolution of other kinds of agreements.

The high incidence of uncontested divorce actions brings another consideration to the fore; namely, that in many jurisdictions service by publication may be had on a non-resident defendant. It is no doubt safe to say that most of the cases are uncontested where service is so obtained.[3] Now if the defendant does not appear, either in person or by counsel, can pretrial be invoked as a practical measure, assuming it is desirable to do so in the first place?

In searching for an answer to this question, it may be proper to stress the virtual conclusiveness of the trial court's decision in the action for divorce.

This type of action is the more or less exclusive domain of the trial court, as distinguished from reviewing courts. That is so because appeals are very few in these cases.[4] The trial court, in effect, is the final arbiter in the action for divorce; and it follows that a correspondingly greater responsibility for the proper disposition of such a case rests upon the trial judge. If the seal of finality is his to affix, it is essentially true that his function cannot be over-emphasized.

Many judges are alive to their responsibilities. And many perhaps feel that they are powerless to deal with these situations except on the basis of satisfying themselves that strict compliance with the statutory norms is effected, and that the evidence in support of the complaint is adequate. Apropos of this, it was pointedly observed by the court, in *Harter v. Harter*, over one hundred years ago:

> Perhaps there is no statute in Ohio more abused than the statute concerning "divorce and alimony." Perhaps there is no statute under which greater imposition is practiced upon the court and more injustice done to individuals. It seems to be considered, by a great portion of our community, that the marriage contract is the least obligatory of all others, and that nothing more is necessary to dissolve it than that application should be made to this court to register a decree to this effect. Not infrequently a husband, who has by cruelty driven his wife from her home, seeks to be divorced from her, charging her with willful absence. And there are cases where the adulterous wife seeks a similar remedy, charging the husband with extreme cruelty. The hearings are generally *ex parte*. Witnesses are examined, friendly to the applicant, and it is almost, if not utterly impossible for the court

3. Of the divorce cases mentioned in note 1, service by publication was obtained in ninety-nine. Divorces were decreed in eighty-two without contest. Fourteen were dismissed on various grounds, generally on plaintiff's motion. In three, divorce was refused, and as to two of these, on judisdictional grounds.

4. By way of illustration, Volumes 136 to 139 incl., of the Ohio Supreme Court Reports cover the period from October, 1939 to May, 1942, approximately. The four volumes contain only six opinions relating to divorce.

in most instances to arrive at the real truths of the case.[5]

Many will agree that this comment is not dated, and if it is were made but yesterday, it probably could not be more timely. Doubtless many contemporary judges would voice similar sentiments.

Some judges, sensing that the quantum of proof in many such cases leaves much to be desired, add requirements of their own, possibly extra-legal in a sense.

To illustrate: the action for divorce in Ohio is a creature of statute. The pertinent statutory provisions contain no requirement that the plaintiff offer specific evidence of good repute, but some judges do.

Again, in the same state, by statute, a divorce action may be heard six weeks after service of summons has been effected or after the first publication of notice, where service is had by publication.[6] In some counties, assignment clerks are instructed not to note such cases for trial until a longer period of time has elapsed. There may be various reasons for this. One which naturally suggests itself is that the court sets up a cooling-off period, for whatever benefit may ensue. Another is to discourage the notion that divorces are granted as a matter of course and with dispatch.

Still another example may be mentioned. In Ohio, where service is had by publication, unless it is made to appear to the court by affidavit or otherwise, that the defendant's residence is unknown to the plaintiff, and could not with reasonable diligence be ascertained, a summons and copy of the petition, forthwith on the filing of it, must be deposited in the post office directed to the defendant at his usual place of residence.[7] Where the defendant's residence is unknown, the affidavit contemplated by this provision generally contains a recital, without supporting data, that the defendant's residence cannot by reasonable diligence be ascertained. Some judges, however, and properly so, require that the affiant set up in some detail in the affidavit what steps were taken to ascertain defendant's residence, to corroborate the statutory proviso that reasonable diligence was truly exercised.

ADVERSARY NATURE OF CASE DISAPPEARS

Yet looking at the matter realistically, the practitioner knows that many judges have a reverse approach. By their manner of dealing with these cases, there are judges who give the lie to the action for divorce as an adversary proceeding. They may not be to blame necessarily. The impact of these cases, assigned in overwhelming number on the trial docket, may make it actually impossible to give them the careful attention they might otherwise evoke. Divorce litigation may form a sizeable bulk of the trial court's activities, and in these circumstances, a trial judge may hardly be castigated for following the line of least resistance. Some judges may hear these cases, more or less informally, in chambers; and apparently, in attempting to abate somewhat the pressure which judicial duties involve, a judge may not be averse to hearing such an action in the court corridor.[8]

It is not only judges who have their obligations in these cases. So do lawyers, and it may be safely assumed that lawyers, like most people, would gladly lend their offices toward working out the problems created in the best interests of the parties and of society. But sometimes there is a restraining hand. If the divorce proceeding is an adversary proceeding, ethical considerations may be involved. For example, should plaintiff's counsel on his own initiative seek out the defendant, the adverse party, with the object of attempting to reconcile the differences of the parties (for which, incidentally, he may not have been retained)

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5. 5 Ohio 318 (1832). The court continues: I would not be understood that there are no meritorious cases. That there are some such there can be no doubt. But of the great multitude of cases which are before this court, I am confident that by far the greater number are not of this class. Aware of these circumstances, and aware, too, of the immoral and mischievous tendency of an easy dissolution of this most solemn of all contracts, we have ever been disposed to give a strict construction to the law, and not to hear a case unless the applicant brings him or herself within both the letter and the spirit of the statute.

6. *Ohio Gen. Code*, sec. 11985.

7. *Note* 6, sec. 11984.

8. The Ohio Bar Assn. Report for August 5, 1940 (p. 276) contains a news item reading, in part: "Judge ——— was en route from his own courtroom to domestic relations court when an attorney asked him to hear an uncontested divorce case. He heard the case in the corridor." In citing this excerpt, the writer does not wish to be understood as impugning in any way the bona fides of Judge ———.

or even to plumb the depths of the controversy, or is he precluded from doing so?

The lawyer may have to hold himself aloof, but the court need not.[9] Obviously, the directing hand should be the court's, and with proper orientation from the bench, the lawyer can render invaluable aid. His function can be effectively channeled in the best interests of all concerned, without departing from the duties he owes his client. The *sine qua non* is that the court set appropriate standards for dealing with this field of litigation, and once this has been done, assistance from counsel may be expected and will be forthcoming as a matter of course.

Here is where the pretrial conference can be of inestimable value. Even in the uncontested action, the court, on its own motion could attempt to convene the parties for an informal conference.[10] At pretrial, it seems likely that a fuller understanding of the differences and the roots from which they grew, can be had,—much more so than will develop at the trial table. This can be done under proper supervision and guidance from the court without restricting or jeopardizing the rights of the litigants in any way; and an impartial, informed judge can accomplish much good.

Particularly in those cases where the destiny of minor children is to be determined, can the court more competely implement its function as their protector.

Assuming, then, that such conferences are desirable, and that they should be called where practicable, some thought must be given to the initial step in the divorce action which must necessarily precede the pretrial conference, that is, the filing of the complaint. The very object of pretrial may be defeated by the inclusion of objectionable matter in the complaint, which is the inception of the suit.

In the usual action for divorce with which the writer is familiar, the plaintiff is permitted considerable latitude in pleading evidentiary matter. While it is true that a complaint so drawn may be seasonably attacked, the damage has already been done with its filing. For generally, the recitals do not make edifying reading.

A synopsis of all the derelictions of the defendant, the many grievances complained of, and detailed expositions of the facts alleged in support of the prayer can produce but one inevitable result—to alienate the defendant, and by their very nature to foreclose any prospect of reconciliation in many cases.

As a general rule pleadings become part of a permanent court record; and such recitals may carry many undesirable ramifications in their train. They may be exaggerated or without merit, but they leave their marks. Sometimes children are stigmatized. In other instances, their effect is to make rabid partisans of relatives and others who may consider themselves affronted.

It is indeed problematical if the airing of such allegations in the complaint is of any help to the court, and we may safely conclude that their primary effect is to accentuate and widen the cleavage between the parties which inspired the bringing of the suit.

PRETRIAL CAN SHORTEN THE COMPLAINT

With a pretrial conference intervening before trial, it would appear that such allegations could very well be dispensed with. In any event, the situation deserves to be corrected and this involves no insuperable difficulties. We may well ask if the complaint need contain allegations other than those essential to satisfy jurisdictional requirements (such as residence, marriage), such other formal allegations as may be necessary (as to children, status of property and like recitals), a short statement that the defendant is guilty of acts constituting one or more grounds for divorce, and the prayer.

If the defendant should require a more amplified exposition, he could ask for it by appro-

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9. In this connection, a section of the *Ohio Gen. Code* which became effective May 17, 1938, may be of interest. Sec. 11979-4 provides:

"On the filing of a petition in divorce or for alimony, the court, in its discretion, may appoint one of its officers to make an investigation as to the character, family relations, past conduct, earning ability, and financial worth of the parties to the action, and if the report of said investigation is filed in the case before trial, may be considered as evidence in the case, subject to the right of either party to cross-examine the party making the investigation.

"The court on its own motion, may cite either party to the action from any point in the state to appear in court and testify as a witness."

Cf. *Anno. Laws Mass.* (1933) Ch. 208, sec. 16; *D. C. Code* (1940 ed.) Title 16, sec. 418.

10. *Note* 9.

priate pleading.

It would seem logical to suggest that, with the elimination of offensive matter from the initial pleading, there would be a greater possibility of preserving the marital status of the parties, if we assume that, in a proper case, it is worthwhile to attempt its preservation in the first instance.

Another minor phase of this problem may be mentioned. In some smaller communities, and possibly in larger ones, too, for that matter, it appears to be the general practice for local newspapers to publicize the filing of such complaints. Without venturing an opinion as to what constitutes news, one may perhaps risk the suggestion that the incidence of such items is probably greater, the smaller the community. Some thought should be given to the desirability of refraining from publishing such items, and if it were to be concluded that this would have a salutary effect, the cooperation of the press would naturally be required. Lawyers know that such publications can seriously affect any prospect of reconciliation, on ocasion, and like the inclusion of offensive allegations in the complaint, may create psychological complications and reactions which are difficult to contend with.

If we are prepared to grant that pretrial merits a place in the action for divorce, some consideration might also be given to the practicability of listing all pending divorce cases on a "conciliation" docket, until such time as pretrial has been scheduled, or until the court has determined that the need for pretrial has been obviated, is not feasible, or cannot be accomplished (as, for example, in the case of non-residence of the defendant and his ignoring of a call to a pretrial conference, or in the situation where defendant's residence is unknown).[11]

One cannot help but feel that there is a sound basis for the adoption of the pretrial technic in these suits. By so doing, the court can more readily and more fully discharge its duties and responsibilities, not only toward the litigants, toward the children of the parties, but toward society too.

11. The adoption of some of the suggestions in the text, concededly, might require enabling legislation.

Texas Bar Votes Against Nine-Juror Verdicts

Readers of the JOURNAL will recall the collection of letters from Texas lawyers on the subject of majority verdicts published last April. Shortly thereafter the State Bar of Texas, by order of its Board of Directors, conducted a referendum of its members to determine their attitude toward the proposed change. Of the state's 8,000 lawyers, 4,543 expressed themselves, and the vote was 2,611 against and 1,932 in favor of the proposal.

The Texas Subcommittee of the American Bar Association Special Committee on Improving the Administration of Justice appointed a subcommittee of its own to investigate the subject of less than unanimous verdicts, and in his report at the Houston meeting on July 2, its chairman, Hon. T. R. James, expressed the view that the wording of the question had something to do with the result. As phrased in the questionnaire, it read: "Do you favor the State Bar of Texas sponsoring legislation for a verdict of nine to three in civil cases only in the civil courts of Texas?"

"Possibly," said Judge James, "had the question indicated reasonable restrictions and safeguards to compel proper deliberation by the jury, many more lawyers would have been willing to try the plan in Texas as it is being used in other states. At least, the vote indicates a difference of opinion.

"It is our own duty as lawyers to keep an open mind on the subject and continue to study it in the light of the experience, as it develops, in the thirty or more states which have adopted some form of less than unanimous jury verdicts. If it is found that the good outweighs the bad and the administration of justice can be improved by a change in some form, certainly the bar should be the first to sponsor.

"If our courts are to continue to function, their machinery must be kept repaired and modernized. We should not favor change merely for the sake of change. On the other hand, we should not refuse or resist the meritorious new solely on the grounds of conservatism."

The Economic Basis for a Society of Advocates*

ALBERT M. KALES†

"The application of the principle of specializing of effort and the repeated use of the same information with regard to litigated cases effects an enormous saving of human effort. The men who achieve this saving can furnish a more efficient service to the public at less cost. A public duty as well as an economic law calls for volunteers in this field. All that is needed is a practical plan for organizing to meet the obvious and insistent demand."

The basis for an advocates' society is the same as that for the title company, the trust company, the casualty company, the surety company, the legal department of a large corporation and a large firm which handles for an annual payment all the legal work of several independent corporations in the same line of business. All alike respond to a public demand for increased efficiency and the saving of waste in some branch of work done by lawyers, and for the rendering of a better service to the public at a less cost.

Litigation in Chicago is large enough in bulk to justify the effort to isolate it for the purpose of handling it more efficiently and with less cost. The controversies which must be settled by a judgment in court number from one hundred and fifty thousand upwards every year. The larger proportion of these do not, of course, require any service from advocates. But among so many units of judicial business there are enough contested causes to justify the devotion of from one hundred to three hundred members of the bar to such work exclusively.

At present the efficiency in a vast amount of contested litigation is very low indeed. This does not necessarily reflect upon the capacity of the men who are doing it. It arises principally from the fact that a great deal of contested litigation is handled by lawyers who go to court too seldom to become efficient.

The wasteful manner in which the courts permit litigation to be conducted is due in great part to the way the lawyer's business is conducted. The courts accommodate themselves to the fact that a great many lawyers with a very few appearances each make up the total number of appearances in the courts and that there is a low standard of efficiency among them. The fundamental source of waste is lack of specialization of effort among lawyers. The lawyer with a few appearances each year in contested matters is obliged to cover the whole subject of practice and procedure and the substantive law for each case. On the other hand, an advocate handling jury trials uses over and over again his knowledge of practice and procedure, the proper handling of witnesses, the law of evidence and in a less degree the rules of substantive law. The same is true of other branches of practice which are distinct from jury trials. The application of the principle of specialization of effort and the repeated use of the same information with regard to litigated cases effects an enormous saving of human effort.

The men who achieve this saving can furnish a more efficient service to the public at a less cost. A public duty as well as an economic law calls for volunteers in this field. All that is needed is a practical plan for organizing to meet the obvious and insistent demand.

FORM OF ORGANIZATION

What kind of an organization can be used? What is its object? and how is it to accomplish that object? These are practical questions.

*Reprinted from 9 Illinois Law Review 478 (1915).

†Now deceased. Formerly professor of law, Northwestern University, and one of the founders of the American Judicature Society.

An advocates' society should have as its charter members lawyers who are interested in the promotion of a profession of advocacy—who believe that there is a sound economic demand for it and that its establishment is for the benefit of the public and the administration of justice. The charter members need not all be lawyers with special practice as advocates. Prominent and influential lawyers who are not advocates may yet desire to promote the existence of a profession of advocacy. Future members of such a society should, however, be lawyers who are more in court in the trial of contested cases than is the average practitioner. Only by such a limitation of membership can a definite interest on the part of members in the promotion of a profession of advocacy be assued. The organization must aim to give to advocates the greatest opportunity for individual development and success. It must insist upon the freest competition among advocates and their complete independence in action of each other. Since these principles apply at least to the future membership in a society of advocates, such a society must be a voluntary association not for pecuniary profit.

The object of such an organization is to assist in the establishment of a profession of advocacy. The existence of such a profession necessarily involves the employment of some lawyers as advocates by other lawyers. No distinct profession of advocacy could arise without the development of this practice. The reason is that only a small part of the client's legal business involves litigation. The lawyer who handles the client's legal business which does not involve litigation has no time to develop efficiency in the handling of litigation or the conduct of it profitably to himself without too high a cost to himself or his client. For the same reason the lawyer who devotes himself to advocacy has no time for the handling of a vast amount of legal business of clients which does not require the activities of an advocate. It follows, therefore, that a profession of advocacy cannot exist unless the lawyer who is in contact with the client with respect to nine-tenths of the client's legal business makes a practice of employing a suitable advocate for the actual trial of the one-tenth of the client's legal business which involves litigation. When, therefore, we say that the object of a society of advocates is to promote the establishment of a profession of advocacy, what we mean is that its object is *to extend the practice among lawyers generally, of employing, in contested litigated cases, members of the bar who make more of a profession of advocacy than does the average practitioner.*

The practical steps now available for accomplishing this object are twofold: *First,* to settle the terms which will be satisfactory to the lawyers at large, as well as the advocates, upon which advocates are to be employed by other lawyers and to give publicity to those terms, as well as assurances of their enforcement so far as the lawyers practicing as advocates are concerned. *Second,* to present to the public and to the lawyers generally those members of the bar whose practice is already such as to warrant their being employed by other lawyers as advocates and who are willing to accept the terms upon which advocates are to be employed by other lawyers; and from year to year to add to the list as rapidly as other members of the bar may qualify, and to drop from the list those members of the bar who have ceased to qualify.

The economic demand for the advocate means that his employment by other lawyers is already fundamentally attractive. His services are already desired because he can render better service at less cost than the man with a large and profitable clientage who goes seldom into court. The general terms of such employment alone remains to be settled.

ADVOCATES MUST NOT STEAL CLIENTS

Of these the most important is the assurance on the part of all lawyers practicing as advocates that they will *scrupulously respect the clientele of lawyers employing them and not avail themselves of any opportunity to win such clients to themselves.* As a matter of fact it is the entire lack of assurance of the observance and enforcement of this rule of conduct that today prevents the development of a profession of advocacy. While the economic demand for advocates presses, the lawyers at large hold back because of the fear—no doubt justified by too many disagreeable experiences of their own and others—that to employ an advocate means the loss of a client. The assurance of the utmost loyalty by the advocate to the interests

of the lawyer who employs him is a *sine qua non* of the existence of a profession of advocacy.

The rule of loyalty on the part of the advocate to the lawyer who employs him is largely self-enforcing because the advocates themselves must recognize that without its strict observance the practice of their profession is impossible. An organization of advocates which gave publicity to this rule, enforced it against its own members by expulsion and gave publicity to its violation by others, would be doing all that is necessary to enforce its observance.

It is important that the employing lawyer should be diligent in the preparation of his case for trial and that this preparation should be done in his office by him, or under his direction, or under the direction of his partners or assistants. In most cases the employing lawyer should start the suit and place the cause in the hands of the advocate fully prepared only when the trial is imminent and all negotiations for settlement are unavailing. Such a mode of proceeding is, of course, not at all imperative, like the rule of loyalty on the part of the advocate toward the employing lawyer. It is important, however, to the lawyer employing the advocate in his relation to his client. If the client's lawyer dumps the incomplete and raw materials of a law suit upon another lawyer and then declines all further responsibility and either refuses or is unable to do any effective lawyer's work, the lawyer who is advocate enough to be employed at all must turn the whole matter over to partners or office assistants for complete preparation. This frequently involves constant contact with the client and the witnesses and it means that the employing lawyer is soon reduced to complete subordination in the matter and at the time of the trial is practically useless. Under such circumstances the lawyer's client will lose respect for him and confidence in him and even if the advocate employed exercised the highest degree of loyalty to the employing lawyer and refused any employment direct from the client at a subsequent time, yet the employing lawyer will in all probability lose his client. It is also of great value to the advocate that he should be employed by able lawyers who can prepare a case thoroughly for trial and who can assist and even take a prominent part in the trial if necessary. Such preparation means far greater chances of success in the case. It means also that the advocate does not have to maintain an office force for the detailed preparation of other lawyer's cases.

TOTAL FEE SHOULD BE SMALLER

The question of fees for the advocate must, of course, be the subject of special arrangement in each case. With the establishment of any profession of advocacy there will be men practicing as advocates who have various degrees of experience and success and whose charges will vary sufficiently to enable any lawyer to find satisfactory talent for the advocate's fees which the case will bear. The client's lawyer will receive his usual fees for the preparation of the case and for such assistance as he may render at the trial if he desires to appear in it as an advocate. The advocate will receive his fair compensation for the preparation and conduct of the trial. This does not mean double fees. It means that the entire fee which is now paid to the client's lawyer for the preparation and conduct of the case in court will be divided, with this difference, however, that since the division of labor means greater efficiency and less waste of time and energy, both in preparation and in the trial, the total fee should be smaller, or else the same total fee should be divided with a larger margin of profit to both the client's lawyer and the advocate.

The presenting to the public and to the lawyers generally of those who are competent to practice as advocates and actually practicing as such may be accomplished in a direct and proper manner as follows:

The advocates' society, when formed, should send out to all the members of the bar in the locality who have been in practice for—let us say—five years, a request for information for the purpose of ascertaining who are practicing as advocates in the trial of contested cases to a greater extent than the average lawyer; whether such practice follows special lines, and what the attitude of such a practitioner is toward the principal terms above mentioned regarding the employment of advocates by other lawyers.

Each lawyer would be asked to give the title and nature of all of the contested causes in the trial of which he had been engaged during a period of—say—two years preceding the re-

quest for information. He would be asked as to each case whether he had conducted it in chief or as a junior; before what judge it was tried, and how long the trial took. He would be asked also as to each case whether he conducted it in the appellate court or in the supreme court, or both, and if so, where the case was reported. He would further be asked as to each case whether he had been employed by another lawyer or a firm of which he was not a member and if so, to give the name.

QUESTIONNAIRE FOR PROSPECTIVE MEMBERS

Then the following questions might be asked:

"Do you wish to be classified as an advocate with (1) a general practice in cases tried with or without a jury and whether civil or criminal, or (2) a jury trial practice in civil and criminal cases, or (3) a jury trial practice in civil cases, or (4) a jury trial practice in criminal cases, or (5) a trial practice in chancery causes and causes tried without a jury, or (6) a practice in appeal cases only?

"If you do not wish to be classified in any of the above ways, state how you would prefer to be classified.

"Do you wish to indicate your general rule as to a minimum *per diem charge?* If so, what is it?

"What proportion of your total professional income is derived from the conduct of contested litigation in the courts?

"What proportion of your total time spent in professional activity is consumed in the preparation and conduct of contested litigation in the courts?

"Will you pledge yourself 'scrupulously to respect the clientele of lawyers employing you and not to avail yourself of any opportunity to win such client to yourself?'

"Do you desire that as a general rule cases brought to you as an advocate by other lawyers should be thoroughly and completely prepared for trial in the office of the employing lawyer and that your employment should commence when efforts to settle the case have been abandoned and the trial is imminent?"

When such questions reach the members of the bar we may assume that those who have no practice in the handling of contested cases in the courts or who have no more than the average practitioner at the present time, will throw the inquiry into the waste basket. It is probable that some of the older members of the bar, though well qualified to take a leading place on any list of advocates, will not be sufficiently interested to reply. But the men who are now actively practicing as advocates, together with those who spend a major portion of their time in the trial of contested cases in court and the principal part of whose professional income is derived from this work, will have a vital interest in responding to the inquiry. No question is asked which such men would have the slightest objection to answering. Younger men who have talents and ambitions in the same direction and have made a start, will be glad of the opportunity to give the information requested. Out of a bar of several thousand, several hundred replies would probably be forthcoming and from the information a list, valuable alike to lawyers and advocates, could be compiled. To this should be attached the terms upon which advocates should be employed, with special reference to the duty of loyalty on the part of the advocate to the employing lawyer and the desirability in general of the employing lawyer preparing the case fully and completely for trial, and employing the advocate only after the case is pending and efforts to settle it have proved futile. A copy of the list should be sent to each member of the bar and the list published in the lawyers' directory. Thereafter it will be one of the important functions of the advocates' society to revise and add to the list from year to year.

One thing a society of advocates must avoid. It should not justify the impression that it is organized to exploit and advertise its own members or to develop a demand for their employment exclusively. Such a society, though open to all members of the bar who qualify, will have to start with only a proportion of those who are qualified to practice as advocates. It may indeed contain in its membership some who are not so qualified at all, but who are sincerely interested in the establishment of a profession of advocacy. Such a society is not organized to promote the fortunes of its own members. It is necessarily organized to devise ways and means of answering an economic demand of the community—a demand that the important work of conducting litigation shall be done with more efficiency and with less waste. To that end its duty is to canvass the entire bar for every member who is qualified to practice as an advocate and who is desirous of being presented to the public and the lawyers as engaged in practice as an advocate and who is willing to abide by the legitimate and proper terms of employment as an advocate.

Judges, Too, Must Speak*

ROBERT G. SIMMONS†

[Much has been said recently of the duty of the legal profession to furnish to the American public a sound leadership in the preservation of representative and constitutional government and other issues confronting the nation wherein lawyers by their training and experience are best qualified to lead. In this address Chief Justice Simmons makes the following significant observations regarding the special obligations of judges in that field:]

I do not absolve my brothers of the bench from the duty and responsibility of public leadership in these fields. When the lawyer becomes a judge he is not freed from the duties of his citizenship. In the legal profession, and in particular among the judges, there exists a vast reservoir of knowledge of problems of government and of statecraft. This power is the result of training that has been directly or indirectly furnished by the American people. They are entitled to the advantages of it. It is now little used.

The judge is removed from the charge that he advocates the cause of self-interest of clients. He serves the cause of justice and of government. When he speaks he speaks with the voice of authority. He is well informed. He, among all the others of our profession, may best expound and explain. He will be heard by those who have an abiding faith in the dignity and the rights of the individual citizen. But to be heard the judge must speak, and speak through the media that reach the public, to wit: the public forum, the press and the radio. It is the voice of the judge that must be heard, and not his echo through the tongue or pen of others.

I realize that heretofore the canons of our profession and provisions of law have not gone beyond the point of suggesting to judges that they advise legislative bodies of the need of change in existing constitutional and statutory provisions. But if we have the duty to go to the legislature should we not go to the people whom the legislatures serve and tell them of our views on the need of changes to better administer justice? It is the people who are concerned. Why not go to the people directly when fundamental constitutional rights are endangered and tell them of the what, the why and the how of constitutional government? There is partial precedent for it. The provision in the original judiciary act that members of the supreme court should sit in the circuit had as one of its purposes the idea that judges of the highest court, could and should, in their charges to grand juries, tell the people of the constitution, its machinery and its purposes. If there was need for that service when constitutional government was being established, there is need for it now when the efficiency and fairness of our administration of justice is being debated and when government by law and constitution is being questioned in our own country and being tested in many nations before the eyes of the world. If there was need for education and instruction then, I submit there is need for it now.

And so I venture to suggest that the judge come out of the cloister of his chambers and discuss with the people the improving of the administration of justice, the maintenance of constitutional government and the principles upon which a lasting peace may be builded. His lips should not be closed on those matters. Fear of personal reprisals at the polls should not deter an elected judge from the performance of his public duties as a citizen any more than it should deter him from the fearless performance of his sworn duty on the bench. His obligation to do this is no less than that of the lawyer and the citizen. It will be good for the judge. It should be good for the country.

Obviously the judge should remain aloof from a sponsorship whose interests might be questioned. Just as obviously the judge should not enter the arena of controverted, partisan legislative or administrative issues, save and

†Extract from an address before the Section of Judicial Administration and the Special Committee on Improving the Administration of Justice of the American Bar Association, and the National Conference of Judicial Councils, Chicago, August 23, 1943.

except those times when even partisan issues go to the very continued application of fundamental principles of government and the proper administration of justice. He should select his issues with care. When he speaks on those issues where he should be heard he should do so with becoming restraint. If he does so he will help not only to maintain the institutions through which an independent judiciary functions, but he will help to support government by law and justice in its deepest and most vital sense.

Jury Verdicts Upon Special Questions in Civil Cases*

CHARLES T. MCCORMICK†

JURY TRIAL IS an expensive way of determining a dispute, as compared with the trial of cases before a judge alone. In criminal cases, there are special considerations relating to the safeguarding of the citizen against official oppression which make the factor of expense less important, but in civil litigation where interests of substance are at stake, the expense of jury trial leads many to raise the question whether it is worth what it costs. In some localities the waiver of juries has become so prevalent as to foreshadow the disappearance of this manner of trial. Nevertheless, probably the majority of lawyers believe that trial by jury in civil cases is a practice that should not die out, and that the profession should use its efforts to preserve this traditional method of trial, by purging it of its imperfections and making available in each state the reforms and improvements in jury trial which have emerged from the experience of other jurisdictions.

One of these variations upon the common form of jury trial is the device of submitting the fact-issues to the jury directly by questions, and taking their verdict in the form of answers, instead of a general finding in favor of the plaintiff or the defendant upon the whole case. The judge enters judgment for one party or the other in accordance with the substantive law applicable to the facts declared in the answers by the jury. For reasons which will be given, it is believed that this method of special questions, if the practice permits the judge to confine their number to a few, and allows him to state them in simple and non-technical language, is a distinct improvement in cases to which it is adapted, upon the usual procedure of calling for a general verdict. It will be observed, however, that the suggested practice is different from two kindred ones which are not so desirable. The first of these is the special verdict, which is a verdict in the form of a narrative of the facts found by the jury. As a practical matter, such a verdict must needs be drafted by the judge or counsel and not by the jury itself, and if the jury's assent is not to be merely nominal, the difficulties of securing an agreement of twelve are enhanced by this form. The second is the custom of "testing" the jury by requiring them, after they have agreed on a general verdict, to answer fact-questions addressed to them by the judge, who may thus determine whether their general verdict is consistent with their fact-findings. This last combination of methods, sanctioned though it is by statutes in many states and by the new Federal Rules (R. 49b), seems likely to increase new trials, and adds complications to trial by jury, a system of trial which by its nature calls for simplicity.

NEED FOR REFORM

What need exists for modifying the custom of returning a general verdict? To answer this, we need to consider the functions of the jury and the justification for retaining such a costly feature of our judicial system. The familiar maxim places on the judge the duty of declaring the law and upon the jury the task of finding the facts. But this statement leaves out of the account the main purpose of the trial, namely, to get a decision of a law-suit between two parties. The declarations of law and findings of fact are not sought as ends in themselves. They are parts of a process in which

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the judge and jury are called on to cooperate in reaching the determination of a dispute between A and B over a bank account, a broken leg, or a corner lot. The jury's part is more than merely ascertaining and declaring facts. If that were all, surely we could find more accurate and less expensive methods of doing it, than by asking twelve laymen to hear eye-witnesses months or years after the event and to make their report thereon.

The jurors when asked to give a general verdict undoubtedly conceive their function more broadly. They feel that they are called on to decide the dispute. They would acknowledge that they should follow the facts and apply the law, if they can, in reaching their decision, but actually they often short-circuit this tedious task without any attempt to perform it. And in any event, they feel that their sense of justice may be weighed in the balance with the law, and may outweigh it. It is probably this insistence of juries upon making their popular sense of right a factor in their decisions, that has given to the jury its chief survival-value.

Of course, this occasional subordination of the law as laid down by the judge to the popular equity of the jury, is greatly facilitated by the traditional manner of submitting the case to the jury for a general verdict. The instructions direct the jury hypothetically that if they find certain facts they will give a verdict for A, and if they find other facts, then for B. But when the verdict comes in, "We find for A," there is no way of knowing whether the jury actually had considered the facts and determined that the facts legally prerequisite to A's recovery existed, or whether they found for A solely because they thought he had right and justice on his side. But this hidden escape-valve from the hardships of fixed law may become an abuse, and may degenerate into a system in which juries tend not merely to temper law with equity in occasional cases of conflict, but to disregard the law generally and follow prejudice or personal favor. This danger is intensified by the prevailing American practice of requiring the judge's instructions on the law to be given in the most tiresome and unpalatable fashion, so as almost to defy the jury to take any interest in them. Instead of the lively conversational summing up of the case on the law and the facts by the judge as under the common-law practice, the jury in many states is now asked to listen to the droning from the written page of long and tedious abstract instructions, ringing the changes ad infinitum upon the effects of various minutely distinguished hypotheses of fact, and devoid of continuity because consisting of a mixture of requested instructions drafted by opposing counsel. Moreover, even when the judge is allowed to give his instructions on the law orally and to make them interesting and concrete, there still are cases where it is desirable to make sure that the jury has considered not merely the question, which party they want to win, but also those questions of fact which the law makes crucial. To that end it is desirable that the lawyers' arguments be centered upon these crucial questions and that the excuse for dwelling upon facts significant chiefly for their appeal to sympathy or passion be minimized. These results can be effectively accomplished by submitting the case, not for a general verdict, but for answers to these ultimate questions of fact.

EXPERIENCE WITH SPECIAL QUESTIONS

This practice of submitting the fact-issues in civil cases directly to the jury is in common use in England, in some of the Canadian provinces, and in Wisconsin, and it is practically the exclusive method of submission of civil cases in North Carolina and Texas. It is sanctioned as one of the allowable methods by Rule 49 (a) of the 1938 Rules of Civil Procedure for the Federal District Courts.

The differences in the handling and development of the practice in the three states are significant. The common-law tradition of submitting the case to the jury in simple and understandable fashion which characterizes the submission on special questions in England and Canada, has been adhered to in North Carolina. The judge sums up to the jury the contentions of the parties, the relevant testimony, and the applicable legal rules, and then directs them to answer the ultimate questions in the case, stated in simple form. The statute commands "that issues shall be framed in concise and direct terms and prolixity and confusion must be avoided by not having too many issues." (1939 Code, Art. 584).

In a recent typical negligence case the following were the issues submitted:

"1. Was plaintiff's testator injured and killed by carelessness and negligence of the defendant,

Colonial Ice Company, as alleged in the complaint?

2. Did plaintiff's testator, by his own carelessness and negligence, contribute to his injury, as alleged in the answer?

3. What damage, if any, is plaintiff entitled to recover of the defendant, Colonial Ice Company?"[1]

In a contract case in the same volume these were the questions:

"1. Did the defendant B. G. Abeyounis sign the Kannan note as principal, as alleged in the complaint?

2. Is the plaintiff's cause of action barred by the three-year statute of limitations?

3. What amount, if any, is the plaintiff entitled to recover of the defendants?

4. What amount, if any, is the defendant B. G. Abeyounis entitled to recover of the plaintiff on his counterclaim?"[2]

With these simple forms of submission may be compared an example of the kind of jargon, meaningless to a jury, which by the triumph of logic over common sense, has become in many states the customary style of instructions:

"Defendant's 9th Prayer—Granted as modified.—The defendant prays the Court to instruct the jury that it was the duty of the plaintiff to look and listen for approaching trains, as he approached the tracks of the defendant on the occasion of the injuries complained of and to continue to look and listen until the said tracks were reached and to further instruct the jury that if they shall find from the evidence that the view of the plaintiff of said tracks, as he then and there approached the same, was in either direction in any way obstructed, then it was the duty of the plaintiff to stop, look and listen for the approaching train or trains before attempting to cross the said tracks; and to further instruct the jury that if they shall further find that the plaintiff did not so look and listen, or did not stop, look and listen if they shall find that the view of the plaintiff of said tracks was in either direction obstructed and shall further find that his failure to so look and listen or to so stop, look and listen, directly contributed to the collision between the engine of the defendant and the automobile which the plaintiff was then and there driving, then the plaintiff is not entitled to recover, unless the jury shall further find from the evidence that the defendant, its agents or employees, in charge of the engine and train which collided with the automobile of the plaintiff could have by the exercise of reasonable care and caution on his or their part, after he or they or any of them became aware of the peril, the plaintiff had by his negligence, if the jury shall so find, placed himself, avoided the consequences of the plaintiff's said negligence and prevented the injuries complained of or unless they further find that the engineer in charge of said engine could by the exercise of reasonable care have discovered the position or peril of the plaintiff while the plaintiff was upon the Antietam Street crossing and that the said engineer could by the exercise of reasonable care have avoided injury to the plaintiff or his property after he ought to have discovered the peril of the plaintiff if the jury so find."[3]

Simplicity and directness in the submission by questions to the jury is the key to the success of the method in North Carolina, where it has practically displaced the general verdict, and where complaints as to the propriety of the questions submitted at the trial are rarely seen in the appellate reports. In Wisconsin the same degree of simplicity of language, and of restraint in the number, of the questions has not been maintained. But the questions, though often more numerous than in North Carolina, are apparently held within reasonable limits, and the appellate reports, bar reports and law reviews give evidence by the absence of controversy and complaint, that the practice works with reasonable smoothness.

It is in Texas, however, that the "special-issues" practice, as it is there called, has been most highly elaborated, and it is there that it has been put to the severest test. Here again, as in North Carolina, it has superseded the general verdict as the ordinary mode of trial. Moreover, Texas has contributed to the development of the practice one of the most useful improvements, namely, the provision that an "issue not submitted and not requested is deemed as found by the court in such a manner as to support the judgment if there is evidence to sustain such findings" (Rev. Civ. Stats., 1925, art. 2190). Unfortunately, the prime function of the questions as a method of putting the case to a jury of laymen in a simple and understandable way has been obscured in the Texas practice. Standards for formulating the questions, sensible and helpful as suggestions for particular cases, were crystallized into rules which were applied almost as rigidly and technically as the common-law rules of special pleading, and the application of these rules so multi-

1. J. W. McClamroch v. Colonial Ice Company and John Bidding, 217 N.C. 107; 6 S.E. (2d) 850 (1940).

2. John Saieed v. B. G. Abeyounis and A. Richard, 217 N.C. 646, 9 S.E. (2d) 399 (1940).

3. Quoted from a Maryland trial record by John W. Staton in his excellent article "The Special Verdict as an Aid to the Jury in Civil Cases," 16 A.B.A. Journal 192, 195 (1930).

plied the questions as to result in the submission of forty or fifty "issues" in an ordinary negligence case.

These rules were numerous but perhaps the most troublesome was the one requiring that the questions submit separately the various fact-theories of each party arising under the pleading and the testimony. Thus, in a negligence case, instead of asking as would usually be done in North Carolina, whether the plaintiff was guilty of contributory negligence "as alleged in the answer" the judge would be required to ask separately whether the plaintiff failed to look, whether he walked across the street in the middle of the block, etc., and separately whether each of these contributed to cause the injury. Another rule which was a constant pitfall required the court on request to submit affirmatively any defensive theory, even though another question submitting the plaintiff's theory impliedly embraced the same issue. For example, in a collision case, in addition to the issues on negligence, and contributory negligence, the defendant was entitled to have the court submit the question separately, "Was the collision an unavoidable accident?" As well may be seen, this right to have the same fact-controversy submitted under different forms of expression was likely to lead to inconsistency in the answers.

Difficulties were created also by the rule forbidding the giving of instructions accompanying the questions except definitions and explanations of terms used in the questions, and by the rule that court and counsel in the questions and argument should not inform the jury as to the effect of their answers on the outcome of the case. It was found to be especially hard to instruct the jury on the burden of proof applicable to the various issues without indicating pretty clearly the effect of the answers, and when counsel argues for a given answer, as he properly may, an attentive juror can hardly escape the inference that the answer will be favorable to the client.

Probably the attempt to dispense with instructions on the law of the case and upon the effect of various fact-combinations, is unwise. As the questions become more simple and general the more desirable it seems for the judge to explain to the jury the sort of facts which will satisfy, and the kind which will not satisfy, the standards denoted by such words as "agent", "waive", "negligent" and "within a reasonable time". Apparently in Texas the basic difficulty has been that a habit of insistence upon an impracticably high degree of verbal accuracy in the general charge, has upon the abandonment of the charge and the substitution of special questions been transferred to the drafting and criticism of questions. In its hey day, the "special-issue practice in Texas bore fruit in a myriad of decisions dealing with the technique of drafting questions, far outnumbering the decisions from all the other jurisdictions together where the special-questions practice obtains. (See Fourth Decennial and General Digest, Trial, Key No.'s 350-366). I have described the Texas experience in the past tense, for the Supreme Court of that state has recently been given control over procedure through the rule-making power and has already modified the practice in this regard for the better and will doubtless further simplify and improve it.

THE FEDERAL RULE

The new Federal rule which provides for verdicts upon special questions offers a model for adoption in states where the practice does not obtain, for it permits the trial judge to choose in his discretion the occasion for use of the questions, and admits of great flexibility in the form of submission. It reads as follows:

"*Special Verdicts and Interrogatories*

"(a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions suceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted, as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

The verdict upon special questions properly used, is a valuable resource which should be

made available to the trial courts in every jurisdiction. Its value consists, however, in the fact that in many cases, direct questions, by their clearness and brevity can best direct the jury's attention to the essential issues and away from prejudice and favor. If, however, the court yields to the pressure of counsel to refine and elaborate the questions or to multiply their number, the method ceases to be a useful way of exhibiting the issues to a group of laymen for their decision. Experience shows that the special-question-verdict can be so used and adapted as to improve, and hence to help preserve, the jury-system in civil cases. But it is an improvement only when the bar accepts the principle that the trial judge has the responsibility for placing the case before the jury, not according to any special system of dialectics, but in a way which is simple, fair, and understandable, and which allows the jury their traditional share in deciding controversies in the light of their sense of justice.

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Bar Integration in the United States in 1943

Passage of the Wisconsin bar integration bill early in 1943 affords an occasion for publishing another integration map of the United States. Similar maps and summaries have previously appeared in December, 1931 (15:107), October 1933 (17:69), October, 1935 (19:77), December, 1937 (21:110), and December, 1939 (23:161).

Addition of Wisconsin to the integrated group divides the states evenly, half and half, with twenty-four integrated and twenty-four not integrated. Counting Puerto Rico, the integrated states are in the majority.

Following passage of the Wisconsin act over the governor's veto, the governor filed suit in the circuit court of the capital city to enjoin publication of the law. That suit, carried to the supreme court, resulted in a denial of the injunction but an express reservation by the court of the right to pass on integration itself when the issue is properly presented. Since the act, as framed, requires the active cooperation of the supreme court in promulgating a set of rules to effectuate it, the question will not long remain in doubt. That the decision of the court will be adverse appears very unlikely.

In addition to the information given on the map and in the text beneath it, we present the following brief outline of the situation in each unintegrated state, with reference to recent JOURNAL articles regarding each:

GROUP A—ACTIVE CAMPAIGN IN 1943

Colorado—After six years in the background, integration was brought to the fore last winter when the board of governors and the executive committee of the state bar association voted to renew the campaign for it. A bill in the form of an enabling act to authorize the supreme court to integrate the bar was drafted and introduced in the legislature, but failed to pass. See this JOURNAL, 27:17, 26:187, 23:164, 22:218 and 22:132.

Connecticut—A petition of the state bar association for integration by rule of court has been pending in the Superior Court for many months. See this JOURNAL, 25:175, 25:158, 23:164 and 22:229.

Indiana—A bill sponsored by the state bar association in the 1943 legislature failed to pass.

Kansas—The state bar association's bill passed the senate but was defeated in the house. See this JOURNAL, 26:188 and 25:175.

Minnesota—A petition of the state bar association for integration by rule of court is pending in the supreme court and is scheduled for reargument, probably this month. See this JOURNAL, 26:188, 25:175, 25:158 and 25:45.

Montana—A bill sponsored by the state bar association passed the lower house and was defeated in the senate. A petition for integration

by rule of court is pending in the supreme court. See this JOURNAL, 26:188 and 24:51.

Tennessee—A bill sponsored by the state bar association failed to pass.

West Virginia—A bill sponsored by the state bar association was passed by the legislature but vetoed by the governor. See this JOURNAL, 27:17 and 23:162.

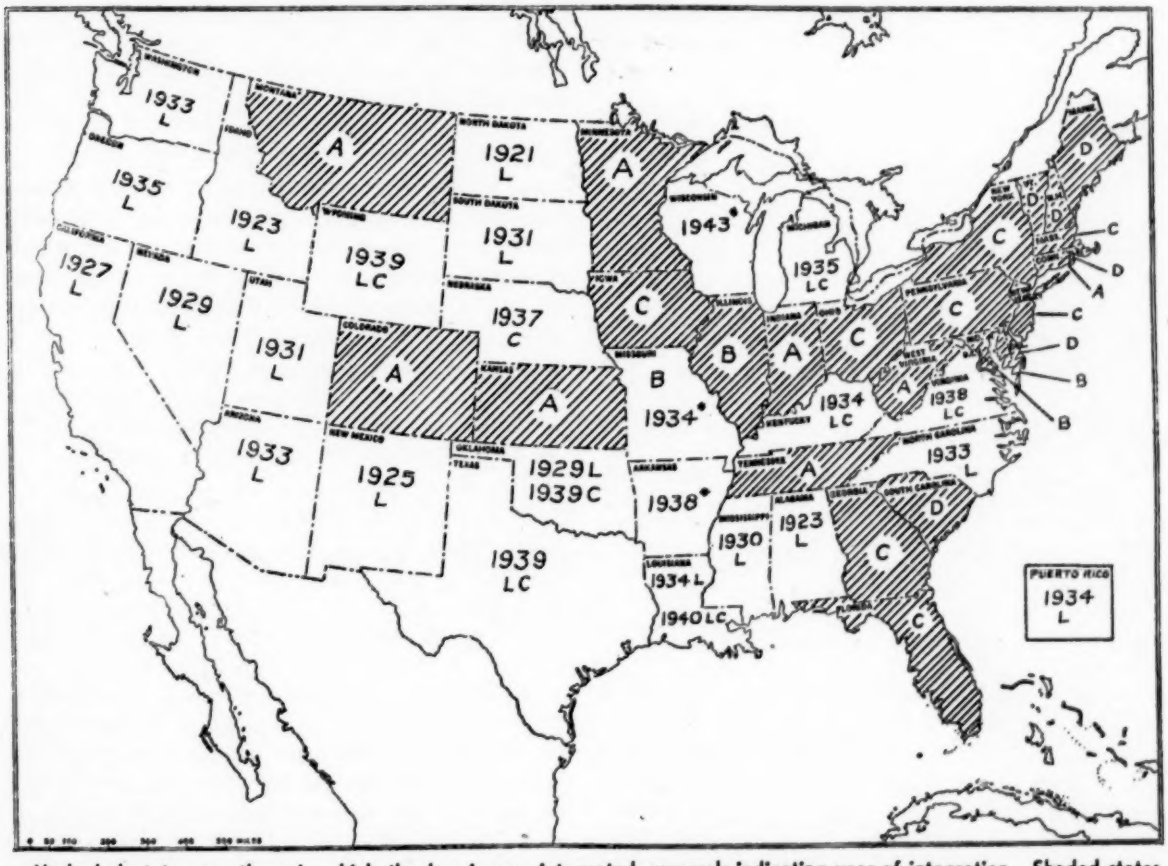
GROUP B—INTEGRATION CURRENTLY OR RECENTLY DISCUSSED

District of Columbia—A committee of the District of Columbia Bar Association conducted an extensive survey of integration two years ago and recommended a specialized form of it adapted to the peculiar needs of the District, which is now before the various local bar groups for study and discussion. See this JOURNAL, 26:188 and 25:175.

Illinois—Discussion of integration has been renewed by an editorial in the June *Illinois Bar Journal* and an address by George E. Brand at the 1943 annual meeting of the state bar association.

Maryland—The subject has been in the hands of a state bar committee since the annual meeting of 1941, when Horace P. Whitworth delivered an address regarding it. See this JOURNAL, 22:23.

Missouri—Although Missouri presently has a bar administration embracing the fundamental features of integration, especially with respect to discipline, membership in the state bar association is voluntary, and the profession thus



Unshaded states are those in which the bar is now integrated, numerals indicating year of integration. Shaded states are those in which the bar is not yet integrated. Explanation of other symbols follows:

INTEGRATED STATES

L—Integrated by act of legislature
C—Integrated by rule of court
LC—Integrated by rule of court following act of legisture
*—Missouri integration is not in conventional form, as explained in the text, and that of Arkansas is similar. Wisconsin integration has only been passed by the legislature and is awaiting action by the court.

UNINTEGRATED STATES

A—Active campaign in 1943
B—Integration currently or recently discussed
C—Dormant since failure of campaign
D—Little or no interest shown

lacks a unified and authoritative voice. The state bar association and the local associations of St. Louis and Kansas City have been discussing integration for a year or two, and the supreme court has been asked to establish full integration by rule of court. See this JOURNAL, 27:18 and 25:176.

GROUP C—DORMANT SINCE FAILURE OF CAMPAIGN

Florida—Bill defeated in 1941 legislature. See this JOURNAL, 25:45.

Georgia—Bill defeated in 1937 legislature. See this JOURNAL, 23:162, 23.125, 21:218 and 20:205.

Iowa—In 1937 the state bar association filed a petition for integration by rule of court, accompanied by a report of a thorough canvass of the lawyers of the state showing a majority of them in favor of it. The supreme court some months later conducted a mail vote of its own, obtaining a slight majority of negative votes, and the petition was not granted. See this JOURNAL, 22:142, 22:41, 21:207 and 21:56.

Massachusetts—A poll of Massachusetts lawyers conducted at the request of the judiciary committee of the legislature in 1941 resulted in a two-thirds majority of favorable votes from about one-third of the lawyers. The committee's decision was "No legislation necessary," evidently considering it a matter for the Supreme Judicial Court, which has taken no action. See this JOURNAL, 27:18, 25:45 and 21:208.

New Jersey—In January, 1939, the highest court of New Jersey denied a petition filed by the state bar association. See this JOURNAL, 22:218 and 21:208.

New York—Early in the 1920's, the state bar association endorsed integration, and an unapproved bill was introduced in the legislature on the last day of the session. The opposition aroused by this step led to the formation of district federations of county associations, still functioning successfully as part of the state association. See this JOURNAL, 21:110.

Ohio—In 1940 the state bar association voted 1,602 to 1,134 against integration, about half of the members not voting. See this JOURNAL, 24:51, 23:162 and 23:88.

Pennsylvania—An extensive study of integration by a committee of the state bar association resulted in an adverse report which was approved by the association in 1938. See this JOURNAL, 22:84.

GROUP D—LITTLE OR NO INTEREST SHOWN

In Maine, New Hampshire, Vermont, Rhode Island and Delaware there exists a small, cohesive bar, closely approaching a condition sometimes referred to as *de facto* integration. There has never been an integration campaign in any of these states. The South Carolina State Bar Association has gone on record in favor of integration, but an active integration campaign has never been waged in that state. See this JOURNAL, 23:161, 22:211 and 21:110.

An Administrative Agency for the Texas Courts*

JAMES P. ALEXANDER†

[For economy of space, the first part of Chief Justice Alexander's address, dealing with the condition of the dockets of Texas courts and other matters of local concern, has been omitted. The Chief Justice refers to current criticisms of the courts, commends the recent granting of rule-making power and subsequent adoption of the new Texas Code of Civil Procedure as a step toward enabling the courts to solve their own problems, and continues:]

Although we secured from the legislature the right to prescribe our own rules of procedure, the shackles which have so long retarded us have not been entirely cut away. We do not yet have an authoritative head of our judiciary to aid in the direction of its business affairs. It would naturally be thought by the average citizen that with as large a judicial system as we have, that employs so many judges, expends so much money, and so vitally affects the rights

*From an address before a joint meeting of the Judicial Section of the Texas State Bar and the Texas Subcommittee of the American Bar Association Special Committee on Improving the Administration of Justice, Houston, July 1, 1943.

†Chief Justice, Supreme Court of Texas.

of the people, there would be some responsible head to direct its business affairs and upon whom responsibility for its failures could be squarely placed. But not so with our judiciary. In this state every judge stands alone and every court is an institution unto itself, wholly independent of all others, save and except for the power of reversal by some higher court. The system is like a thousand-legged worm without any head, each leg being free to pull in its own direction. It is not surprising that we have been slow to make progress under such a system.

Let me here says most emphatically that I do not advocate any supervision other than the power of reversal by a higher court over the exercise of the judicial functions vested in the judges. The judge must at all times be free in the exercise of the judicial discretion properly vested in him. That is one of the fundamental, sound characteristics of our American courts, and it must not be disturbed. But I do recommend that the judiciary be more closely integrated, and that the Supreme Court, or some member thereof, be empowered and charged with the responsibility of seeing to it that the business end of our judicial system is operated in a more efficient manner, and that an administrative agency be established to assist in the accomplishment of this purpose.

Undoubtedly we have sufficient manpower, if properly distributed, to handle the judicial problems of this State. But there may be badly congested dockets in some areas, with judges idle in others, yet there is no over-all head charged with the responsibility of ascertaining the existence of these conditions, nor vested with the authority to remedy them. The judiciary is blamed for the congested dockets, but has no means to remedy the situation. Again, there may be an utter waste of state funds in some districts, with a penurious saving by judges in others, yet there is no agency to ascertain these facts and call the matter to the attention of the legislature. There may be efficient modes of procedure in operation in some districts, while outmoded methods still prevail in others. We have no statutory integration of the judiciary, where all may be brought together and given the benefit of the better practices followed by the more successful judges. More than thirty years ago the legislature recognized the necessity for it and passed laws requiring our school teachers to attend annual institutes and to take refresher courses at regular intervals in order that they might be more proficient in their work. But the judiciary is still neglected in this respect.

The irony of the whole situation lies in the fact that while the judiciary and every judge thereof gets the blame for all of the shortcomings of the entire system, yet the judiciary has not been implemented with the facilities for remedying many of the evils complained of.

NEED FOR JUDICIAL CONFERENCES

The idea of an integrated judiciary is not entirely new in this country. Mr. Chief Justice Taft shortly before coming to the Chief Justiceship of the Supreme Court of the United States in 1921 first proposed such a measure. With reference to his proposed measure he had this to say:

"In the bill is another important feature that in a sense contains the kernel of the whole program intended by the bill. It provides for annual meetings of the Chief Justice and the senior circuit judges from the nine circuits, and the Attorney General, to consider required reports from district judges and clerks as to the business of their respective districts, with a view to making a yearly plan for the massing of the new and old judicial forces of the United States in these districts all over the country where the arrears are threatening to interfere with the usefulness of the courts. It is the introduction into our courts of an executive principle to secure effective teamwork. Heretofore each judge has paddled his own canoe and has done the best he could with his district. He has been subject to little supervision, if any. Judges are men, and are not so keenly charged with the duty of constant labor that the stimulus of an annual inquiry into what they are doing may not be helpful. With such mild visitation he is likely to co-operate much more readily in an organized effort to get rid of business and do justice than under the go-as-you-please system of our present federal judges, which has left unemployed in easy districts a good deal of the judicial energy that may now be usefully applied elsewhere.

"This executive principle of using all the judicial force economically and at the points where most needed should be adopted in every state, and when adopted will offer a remedy to a great deal of the injustice by delay that now exists. State judges, as well as federal judges, should be interested in the adoption of this federal measure as a model for the states."

The reform proposed by Mr. Chief Justice Taft was adopted by the Congress in 1922 and

became the working basis for many of the improvements that have since been brought about in our federal system. Many of our own judges recognized the necessity of a conference of the judges when we organized our voluntary judicial conference in this state in 1941. These conferences have been well attended, and all who have attended them will certify to their value. But we need legislation to give the conferences a legal status and to bring about a more unanimous attendance upon these meetings.

VALUE OF ADMINISTRATIVE OFFICE PROVEN

That there should be some over-all head responsible to the people for making the business end of the judiciary work properly, no one can hardly deny. As is well known, what is everybody's business is nobody's business. Undoubtedly if a little business administration were injected into the system we could not only relieve the condition of our congested dockets, but we could save the taxpayers much money.

The matter of an administrative agency for the judiciary is not entirely new in this country either. It too was first adopted by Congress for the improvement of any federal system. The Administrative Office of the United States Courts was created by an act of congress in 1939. The purpose of the act is thus stated by the Judicial Committee of the House in recommending the bill:

"The design of the legislation is to furnish the federal courts the administrative machinery for self-improvement through which those courts will be able to scrutinize their own work and develop efficiency and promptness in their administration of justice."

The director of the office is appointed by the Supreme Court and acts under the direction of the judicial conference. He gathers statistics showing the conditions of the various courts, investigates and reports the expenditures of public funds allotted to the support of the judiciary, makes recommendations as to the budget needs, suggests policies for the improvement of the system, and performs other functions too numerous to be here mentioned. His office has become a clearing house not only for statistical needs but for the adjustment of the dockets of the various courts. Judges with overcrowded dockets report the condition of their dockets to him. Through statistical information he knows where idle judges are located. He is thus in position to make recommendation for the prompt transfer of the idle judge to the congested district, and in this way the full manpower of the district is kept busy and the dockets are kept current; and as a result the people may secure a more prompt solution of their legal problems without additional cost to the taxpayers.

Administrative agencies have already been provided for in various forms in several states of the Union. Chief Justice Maltbie, of the Connecticut Supreme Court, had this to say about one of the purposes of the administrative act adopted in his state:

"The second underlying purpose grew out of the fact that the judges are in most instances peculiarly unsuited to determine questions involving the proper expenditure of public money for the maintenance of the courts, and are, I think I may say truthfully, with few exceptions, entirely too prone to accept as correct almost any expenditures which are placed before them by the officers of the courts.

"We found that a great deal of money was being spent inadvisedly and in some instances beyond the scope of the limitations established by the statute and the appropriation bills enacted by the legislature, and that it was a rather vain hope to rely upon the judges to curb such expenditures."

The matter of integrating the judiciary and providing a responsible head for it, with an agency to look after its business affairs, rests solely with the legislature. We can do nothing along this line without its consent. If the legislature will take this step I believe it will be a forward one, and will result in much improvement of our judicial system.

The experience acquired by a judge while in the public's pay is a community asset whose value increases in proportion as he contributes from his experience to the improvement of the institutions administering justice.—*Harry M. Fisher, J.*

The Rule-Making Power*

JOHN B. SANBORN†

"To use the language of the patent lawyer, all procedural devices are old in the art, and their improvement requires the skill of the trained mechanic familiar with the prior art."

The delegation of rule-making power contained in the proposed article[1] is based upon the theory that it will be in the public interest for the judicial branch of the state government, which is held responsible for the proper administration of justice, to have the power to regulate practice and procedure in the courts of the state and to control, in a substantial way, the allocation of the judicial business among those courts.

The sections of the proposed judiciary article relating to the rule-making power are Sections 2, 9, 10 and 16. Section 2 contains the provision that the supreme court "may prescribe for all divisions of the general court rules of practice and procedure and of evidence and may delegate to the other divisions or to the Administrative Council such rule-making power as it deems expedient." Section 9 grants to the Administrative Council, which is representative of all divisions of the General Court, power to adopt rules, with the approval of the Supreme Court, for the purpose of making changes in the jurisdiction conferred upon the district and county courts. The rule-making power granted by Section 9 to the Administrative Council is intended to be in aid of judicial administration and to enable the General Court to meet changing conditions occasioned by shifts in population and in the volume of litigation. Section 10 gives to the rules of the Supreme Court and to the rules of the Administrative Council and of other divisions of the General Court, made under authority delegated by the Supreme Court, the force of law after the rules have been filed in the office of the Secretary of State. Section 16 continues in effect all existing statutes applicable to the courts and all rules of practice and procedure not inconsistent with the proposed judiciary article, until changed by law or by rule.

The effect of the provisions relating to the rule-making power is to confer upon the Supreme Court, as the highest division of the General Court, power to regulate judicial procedure, and to give to the Administrative Council, as the governing body of the General Court, the power to make rules, subject to the approval of the Supreme Court, for the purpose of re-allocating the jurisdiction of the trial divisions of the General Court. The ultimate result is that the General Court becomes virtually a self-governing organization with respect to matters of practice and procedure and with respect to the re-allocation of its jurisdiction other than that which is appellate. The proposed article does not deprive the legislature of the power to enact procedural statutes, but such statutes could be amended or abrogated by rules of the Supreme Court. Undoubtedly, the practical effect of the adoption of the article under consideration would be to transfer to the Supreme Court control over the procedure and the judicial business in the courts of the State. If the regulation of practice and procedure—or, in other words, the mechanics for commencing, conducting, trying, and terminating actions and proceedings in courts of the State—is essentially a judicial function, it seems appropriate that the judicial branch of the government should exercise it.

It must be kept in mind that the power to make procedural rules is not the power to alter or to impair substantive rights. Such rules deal only with the methods or mechanics for securing the adjudication of such rights. Substantive rights are created by the common law or by legislation. The devices which over the years have been developed for the purpose of enabling litigants to secure an adjudication of their substantive rights are well known to those learned in the law, and fundamentally do not differ greatly in the various jurisdictions in this country. To use the language of the patent lawyer—all procedural devices are old in the

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1. Reference is to the proposed judiciary article for the Minnesota constitution drafted by the judicial council's committee and published in this JOURNAL, February, 1943, 26:135.

art, and their improvement requires the skill of the trained mechanic familiar with the prior art, and does not call for inventive genius. The committee which formulated the proposed judiciary article concluded that the regulation of procedure is essentially a judicial function, and that the duty and responsibility of improving procedural rules and managing its own business should, in the public interest, be conferred upon the judicial branch of the government. The public undoubtedly holds the bench and the bar responsible for the proper administration of justice. If they are to bear that responsibility, they should also have the means of regulating the procedural devices, defects in which often produce miscarriages of justice.

Congress has conferred upon the Supreme Court of the United States power to promulgate rules governing practice and procedure in the federal courts, which is some recognition of the correctness of the proposition that the regulation of court procedure is primarily a judicial function. Prior to the adoption by the Supreme Court of the United States, in 1938, of the Federal Rules of Civil Procedure, the federal rule-making power was virtually dormant and had lain dormant for many years. All of the judges of the federal courts, as well as the members of the bar, recognized that serious defects in federal practice existed, but the difficulty of procuring legislation to correct them was so great as to prevent changes being made. The Supreme Court of the United States, with the aid of the bench and bar of the country, in 1938 promulgated a compact code of simple and understandable rules of procedure in civil cases, which virtually assures to litigants in the United States Courts a speedy and fair trial of their cases upon the merits. At the present time, that court has undertaken to formulate rules regulating federal practice and procedure in criminal cases.

Approximately half of the states have conferred upon their highest courts the power to make procedural rules. Included among these are all the states bordering upon Minnesota.

There is no justification for any fear that revolutionary changes in the rules of practice will be made if the Supreme Court of Minnesota is given rule-making power. For more than twenty years I have been associated with judges of trial and appellate courts. I have participated in the drafting of trial court rules and appellate court rules. I have at times tried to secure what I thought were desirable changes in rules. With respect to suggested changes of a substantial character in any rule of practice, I found that the burden of proving conclusively that the change would be beneficial is always upon the proponent of the change. Twenty years ago, while I was a district judge of Ramsey County, I advocated a change of the rule requiring that special terms should be held on Saturday mornings. The suggested change was finally made within the last two months. This is some indication that courts do not act hastily in changing rules. Remember that no court is any more anxious to repeal familiar and satisfactory rules of procedure than the bar is to have them repealed. The power to make procedural rules, including the rules of evidence, is, in practice, the power to simplify and to supplement existing rules and to fit into the judicial machinery procedural devices of proven merit and to remove outworn and defective parts. The exercise of the power necessarily calls for the cooperation of the bar. Rule-making is, in practice, a burdensome duty and responsibility, rather than a privilege or a power.

There is no basis for a belief that the power to regulate procedure conferred upon the Supreme Court of the state by this proposed judiciary article would be abused. Surely that court can be trusted not to impair its own usefulness and the usefulness of the courts of the state by unreasonable procedural rules. While legislatures have sometimes abused the power to make rules affecting practice in the courts, these abuses were due mainly, I think, to political pressure coupled with a lack of the skill and knowledge necessary to formulate proper rules. The Supreme Court has had the power to rule that the judicial branch of the state government could regulate judicial procedure and that the power granted to the legislature by the constitution to make rules of practice was not exclusive, but was permissive and concurrent. The court has been guilty of no abuse of the important powers which it has always had, and has never reached for additional powers. I know of nothing in its history or in the history of similar courts of other states or of the Supreme Court of the United States which furnishes the slightest basis for any suggestion that power to regulate the practice of the courts in the state would ever be misused. On the contrary, experience indicates that the power would be wisely exercised in the public interest.

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You can not maintain democratic institutions by mere forms of words or by occasional patriotic vows. You maintain them by making the institutions of our Republic work as they are intended to work.—*Charles E. Hughes.*